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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 10

WHYY, INC.,

Appellant,

v.

BOROUGH OF GLASSBORO

and

DIVISION OF TAX APPEALS OF THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

On Appeal From the Supreme Court of New Jersey.

BRIEF FOR APPELLANT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 824.

WHYY, INC.,

Appellant,

v.

BOROUGH OF GLASSBORO

AND

DIVISION OF TAX APPEALS OF THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The opinion of the Supreme Court of New Jersey is reported at 50 N. J. 6, 231 A. 2d 608 (1967). See Appendix 1 to this brief. (A-6). The opinion of the Superior Court, Appellate Division, is reported at 91 N. J. Super. 269, 219 A. 2d 893 (1966). See Appendix 2 to this brief. (A-3).

JURISDICTION.

Proceedings leading to this appeal were begun by petition to the Division of Tax Appeals, in the Department of the Treasury, State of New Jersey, to set aside a denial by the Gloucester County Board of Taxation of appellant's petition for exemption of its property from personal and real property tax under New Jersey Statutes Annotated 54:4-3.6 (A-24).

The judgment of the Division of Tax Appeals denied appellant's petition on November 17, 1965, and affirmed the decision of the Gloucester County Board of Taxation (A-33).

The decision of the Division of Tax Appeals was appealed to the Superior Court of New Jersey, Appellate Division, which, on May 20, 1966, affirmed the decision of the Division of Tax Appeals (A-3).

Appellant appealed to the Supreme Court of New Jersey, which, on July 5, 1967, affirmed the judgment of the Superior Court (A-6).

Appellant's Notice of Appeal to this Court was filed in the Supreme Court of New Jersey on September 19, 1967, within the statutorily prescribed period.

This Court noted probable jurisdiction on March 11, 1968.

The question involved is the constitutionality, under the Fourteenth Amendment to the Federal Constitution, of a New Jersey statute, L. 1941, Ch. 243, p. 663, § 1, as amended, N. J. S. A. 54:4-3.6, which undertakes to tax a Pennsylvania nonprofit corporation, qualified, registered and admitted in New Jersey, on the value of its real and personal property used exclusively in New Jersey for educational purposes, but does not tax identical property used for identical purposes when such property is owned by nonprofit corporations incorporated in New Jersey.

The Supreme Court of New Jersey expressly rejected a direct challenge to the statute's constitutionality, based on the Fourteenth Amendment (A-9).

Jurisdiction in this case is predicated upon 28 U. S. C. § 1257(2). *Warren Trading Post Co. v. Arizona State Taxing Commission,* 380 U. S. 685 (1965); *Central R. Co. of Pennsylvania v. Commonwealth of Pennsylvania,* 370 U. S. 607 (1962); *Standard Oil Co. v. Peck,* 342 U. S. 382 (1952).

STATUTES INVOLVED.

New Jersey Statutes Annotated, Title 14, Chapter 15-2, 3, 4; Title 54, Chapter 4-3.6; Title 54, Chapter 10A; see Appendix 3 to this brief.

United States Constitution, Amendment XIV, § 1; see Appendix 4 to this brief.

Pennsylvania Nonprofit Corporation Law, 15 Purd. Pa. Stat. Annotated §§ 7001, et seq.; see Appendix 5 to this brief.

QUESTION PRESENTED.

Whether the Supreme Court of New Jersey has denied appellant equal protection of the laws by upholding the constitutionality of a New Jersey statute which purports to tax a Pennsylvania nonprofit corporation, qualified, registered and admitted to do business in New Jersey, on property used in New Jersey exclusively for educational purposes, but does not tax identical property used for identical purposes if that property is owned by nonprofit corporations incorporated in New Jersey.

STATEMENT OF THE CASE.

There is no dispute concerning any of the facts.

Appellant is organized as a nonprofit corporation under the Pennsylvania Nonprofit Corporation Law, 15 Purd. Pa. Stat. Ann. §§ 7001 et seq. (A-49, 50). It operates an educational television and radio station which broadcasts cultural, recreational and educational, non-commercial, radio and television programs in the Delaware Valley area, under license by the Federal Communications Commission.

Appellant is admitted to do business as a foreign nonprofit corporation in the state of New Jersey. By this admission to do business, New Jersey has granted WHYY within the state all the lawful business rights of a corporation incorporated under the laws of New Jersey for the conduct of similar business (A-4, 7, 14, 28, 47-50).

WHYY is authorized by the Federal Communications Commission to broadcast non-commercial television on two channels: VHF Channel 12, allocated to Wilmington, Delaware, and UHF Channel 35, allocated to Philadelphia. The Commission also authorized non-commercial FM radio broadcasts by appellant, on Station WUHY, operating on a frequency of 90.9 mc., allocated to Philadelphia. Although all three permits are in use, the property involved in this appeal is the land, buildings and equipment used for the TV Channel 12 transmitter, all of which is located in New Jersey; consequently, Channel 35 and the radio station are not involved in this proceeding (A-47, 48).

The coverage area for Channel 12 provided by the main transmitter located at Glassboro, New Jersey, and supplemented by a "translator" at Milton, Delaware, includes not only the southern part of New Jersey, but also the entire state of Delaware, southeastern Pennsylvania and a small part of Maryland (A-59, 60). Although precise popu-

lation figures are not available, WHYY's signals reach approximately 8,000,000 people, of whom about 29.5% are residents of New Jersey (A-49).

WHYY's programs can be classified into two categories: in-school use, and general. Most of the daytime programs are intended for in-school use. These broadcasts consist of elementary and secondary school teaching programs coordinated with the curricula of subscribing school districts in Pennsylvania, Delaware and New Jersey. Seven such districts are located in New Jersey (A-52-54). On weekdays, from 4 p.m. to 11:30 p.m., and on Sundays, general programming is devoted to broadcasts of a cultural, informative and educational nature. Included in the general programming are local broadcasts intended to appeal especially to residents of New Jersey (A-54-56, 66-67).

By the terms of its Articles of Incorporation and the Pennsylvania statute under which it was organized, WHYY is forbidden to engage in any activities which enure to the gain of any private corporation or individual. It has no stockholders and can pay no dividends (A-50).

As a non-commercial, educational licensee of the Federal Communications Commission, WHYY is also barred by federal statute and SEC regulations from accepting advertising or selling time. Its funds are obtained primarily from (1) payments by school districts for programming services for use in public schools, (2) governmental agencies and subsidies, and (3) contributions by individuals and organizations (A-50-54).

WHYY has been exempted from taxation by all other governmental taxing authorities. The Internal Revenue Service has determined that the corporation is an "exempt organization" organized and operated exclusively for charitable and educational purposes under section 501(c)(3) of the Internal Revenue Code. Further, contributions to

WHYY are deductible as charitable contributions for federal income tax purposes. Appellant has also been exempted from the payment of sales, license and property taxes by the Commonwealth of Pennsylvania and by the Cities of Philadelphia, Pennsylvania and Wilmington, Delaware (A-28, 34, 50).

The instant action arises out of an attempt by the Borough of Glassboro to impose taxes upon real and personal property devoted exclusively to WHYY's Channel 12 transmissions. The real property, which is the only property owned by WHYY in New Jersey, was purchased in 1963 (A-48). Subsequently WHYY erected thereon a television transmission station and tower (A-30). The Borough levied tax assessments for the year 1964 on this entire property. WHYY thereupon requested exemption as an educational, nonprofit corporation. The request was denied and, on August 13, 1964, the proceedings leading to this appeal were begun (A-19, 21).

The Superior Court of New Jersey noted that "... The Company is not 'incorporated or organized under the laws of this State' and noted that 'were it not for this, it would meet the criteria of N. J. S. A. 54:4-3.6:' " (A-5).

The Supreme Court of New Jersey affirmed the denial of the exemption and specifically rejected appellant's argument based on the Equal Protection Clause (A-9-10).

SUMMARY OF ARGUMENT.

In attempting to tax the property of appellant, a registered, foreign nonprofit corporation, and at the same time not taxing the same type of property if owned by any domestic nonprofit corporation, the state of New Jersey is denying equal protection of its laws to the appellant, contrary to the Fourteenth Amendment.

A state may impose discriminatory requirements on a foreign corporation as a condition to admission within its boundaries; however, once such a corporation has been admitted and is registered in the state, it is entitled to treatment equal to that accorded the domestic corporations of a state. Appellant, having been duly admitted to the state of New Jersey, is entitled to be taxed in the same manner as any New Jersey corporation within the same classification.

The issue involved was decided in *Wheeling Steel Corporation v. Glander,* 337 U. S. 562 (1949), where this Court invalidated an ad valorem tax on property owned by an out-of-state corporation, registered to do business in the state, while exempting identical property owned by domestic corporations of the same class.

ARGUMENT.

A Foreign Nonprofit Corporation Qualified and Admitted to the State of New Jersey and Whose Operations Substantially Benefit the People of New Jersey Is Denied Equal Protection of the Laws Under the Fourteenth Amendment When a Property Tax Exemption Granted to Domestic Nonprofit Corporations Is Denied the Foreign Nonprofit Corporation Solely Because It Was Not Incorporated in New Jersey.

This case presents the simple question whether the Federal Constitution permits a state to levy a property tax on registered foreign corporations and at the same time exempt identical property of domestic corporations, where the sole basis for discrimination is the state of incorporation.

There is no question concerning any of the facts; there is no question concerning the nature of the tax as a property tax, as distinguished from a franchise tax; indeed there is no question concerning the nature of the question, because the opinions of the courts below have made it clear that appellant would not have to pay this tax if, instead of having been incorporated in Pennsylvania, it had chosen New Jersey as its home state (A-5, 9-10).

This Court in *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 237 (1890), first pointed to the limits on the taxing power of a state imposed by the Fourteenth Amendment:

> "The provision in the XIVth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses,

exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unsual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

Although the Court in *Bell's Gap* laid down no "iron rule" regarding equality in taxation, the doctrine was soon evolved that all classifications must "rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and never be made arbitrarily and without any such basis." *Gulf, Colo. & S. F. Ry. v. Ellis,* 165 U. S. 150, 155 (1897).

At least since *Southern Railway Co. v. Greene,* 216 U. S. 400 (1910), an unbroken line of decisions by this Court has held that a tax which discriminates solely on the basis of the residence of the individual owner, or state of incorporation, is a violation of the Equal Protection Clause of the Fourteenth Amendment. A State may impose discriminatory requirements on a foreign corporation as a condition to admission within its boundaries. However, once the corporation has been admitted, it is entitled to treatment equal to that accorded to the state's own

corporate progeny. *Reserve Life Insurance Co. v. Bowers,* 380 U. S. 258 (1965); *Allied Stores of Ohio v. Bowers,* 358 U. S. 522 (1959); *Wheeling Steel Corporation v. Glander,* 337 U. S. 562 (1949); *Power Mfg. Co. v. Saunders,* 274 U. S. 490 (1927); *Hanover Fire Insurance Co. v. Harding,* 272 U. S. 494 (1926).

As was pointed out in *Township of Hillsborough v. Cromwell,* 326 U. S. 620, 623 (1946), a case dealing with individual taxpayers, the ultimate guarantee to all citizens is the right to equal treatment:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment."

The most recent discussion of the principle as applied to corporations is found in *Wheeling Steel Corporation v. Glander,* 337 U. S. 562 (1949). In that case, this Court invalidated an Ohio statute levying an ad valorem tax on intangibles of foreign corporations, but exempting identical property of resident individuals and domestic corporations.

The controlling cencept was stated by this Court as follows:

> "After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable *ad valorem* tax basis. Hanover F. Ins. Co. v. Harding (Hanover F. Ins. Co. v. Carr), 272 U. S. 494, 510, 511, 71 L. ed. 372, 380, 381, 47 S. Ct. 179, 49 ALR 713; Power Mfg. Co. v. Saunders, 274 U. S. 490, 493, 497, 71 L. ed. 1165, 1167, 1169, 47 S. Ct. 678." *Id.* at 571-72.

The discrimination condemned in *Wheeling Steel* resulted from the lack of any rational basis for the state tax classifications. The Court stated:

> "If on the taxing date one of these petitioners and an Ohio competitor each owns an account receivable of the same amount from the same out-of-state customer for the same kind of commodity, both shipped from a manufacturing plant in Ohio and both sold out of Ohio by an agent having an office out of the State, appellant's account receivable would be subject to Ohio's *ad valorem* tax and the one held by the competing domestic corporation would not. *It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner.*" *Id.* at 572. (Emphasis added.)

In its effort to uphold the tax, Ohio contended that this case was distinguished by a so-called "reciprocity" provision, under which the State of Ohio purported to grant to other states the right to tax the intangibles of Ohio residents who were exempted from the Ohio tax. But this Court said:

> "It is clear that this plan of 'reciprocity' is not one which by credits or otherwise protects the nonresident or foreign corporation against the discriminations apparent in the Ohio statute. We think these discriminations deny appellants equal protection of Ohio law." *Id.* at 574.

In view of its conclusion based on the equal protection clause, the Court found it "inappropriate to decide the Due Process question." *Id.* at 570.

Most recently, the rule was regarded as so well settled that, in noting probable jurisdiction of an appeal from a

State decision upholding such a tax, this Court ordered the case listed on the summary calendar, and then reversed in a *per curiam* memorandum decision, citing the *Wheeling Steel* case: *Reserve Life Insurance Co. v. Bowers,* 379 U. S. 810 (1964), 380 U. S. 258 (1965), *reversing* 175 Ohio St. 468, 196 N. E. 2d 87 (1964).

Unlike the Ohio statute with its "reciprocity" plan, the instant New Jersey statute offers no justification or excuse for its discrimination against foreign corporations. Indeed, the New Jersey Supreme Court made no effort to discuss the applicable decisions by this Court, or to reconcile its decision with them. That court did not mention any of the relevant precedents; it based its decision on the twin presumptions that statutes are constitutional, and that the legislature had a valid classification in mind. It then noted that here, there are

> "*possibilities* for treating foreign nonprofit corporations differently from domestic nonprofit corporations.
>
> "It should be noted that our statute requires not only that the property be used for a specified purpose but also that the owner shall be a nonprofit corporation. The corporation laws of sister states *may* be less exacting than New Jersey with respect to what organizations qualify as nonprofit. If New Jersey were to grant exemptions to foreign nonprofit corporations because the state of incorporation deemed them to be nonprofit in nature, *it may well be* that exemptions would thereby be granted to corporations which, if formed here, would not have a tax exempt status. The Legislature could validly decide that the State should not be *burdened with the administrative problem* of checking the status of foreign corporations under foreign laws and evaluating them with our requirements." (Emphasis supplied.) (A-10).

This suggests a truly novel method of avoiding the requirements of the Equal Protection Clause. If the record in any case may be disregarded, in favor of facts which are invented to support a preconceived theory of reasonable classification, every discrimination is legalized. The court below did not attempt to relate the "possibilities" for different treatment to the facts in the case at bar; it was content to hold merely that in view of the *possibility* such differences might be found *if* the facts *were* ascertained, the State "should not be burdened with the administrative problem . . ." of making the effort to find them.

Obviously, the argument proves too much. If the state court need not consider the facts actually before it, but may instead base its decision on unspecified "possibilities" conjured up by its imaginaiton, the Equal Protection Clause is dead. It is impossible to imagine any discrimination which could not pass such a test. No case can arise which would not be equally susceptible to this approach adopted by the court below.

It has been nowhere suggested that there is in fact any significant difference in this case to justify the present classification; nor could any such suggestion be maintained in view of the undisputed facts. At no stage of the present proceedings has counsel for appellee suggested that appellant's activities fall short in any manner of the traditional concepts of nonprofit organizations contemplated by the statute *; nor, so far as counsel for appellant is aware, was

* In 1967, after the decisions by the Division of Tax Appeals and by the Superior Court, Appellate Division, rejecting appellant's claimed exemption, and while its appeal was pending in the Supreme Court of New Jersey, the New Jersey legislature enacted a statute exempting the property of nonprofit educational television stations, equally applicable to foreign and domestic corporations, which will exempt the property of appellant from property taxes for 1968 and thereafter: Chapter 24 of the New Jersey Laws of 1967, effective April 18, 1967.

such suggestion made by any administrative, legislative or judicial officer of the state.

The court below, *sua sponte,* asked appellant before the case was called for argument to furnish a supplemental statement of fact, to show the extent to which appellant's work conferred a benefit on the people of New Jersey, as compared to other states. This statement demonstrates that there is no significant difference between the benefits generated by appellant's activities for any of the four states within its service area, except insofar as such difference might be related to geographical and population factors; that as to the former, the New Jersey part of appellant's "Grade A" service area represents the larger part of the whole of such area; and that as to the latter an estimated twenty-nine percent of the people within the entire service area of appellant reside within its New Jersey segment (A-47-67).

This request could have presaged an attempt to find a rational basis for the present classification grounded on the distinction made by this Court in *Board of Education of Kentucky Methodist Episcopal Church v. Illinois,* 203 U. S. 553 (1906). There an Illinois statutory exemption from taxation in favor of charitable organizations, for property received by bequest or devise, was limited to domestic nonprofit corporations. The foreign corporation seeking such exemption was legally forbidden to expend any of its funds outside of Kentucky, the state of its incorporation. Mr. Justice McKenna, speaking for this Court, found a rational basis for the Illinois classification in the absence and indeed the impossibility of any benefit to be conferred on the people of Illinois by the work of the Kentucky charity seeking such exemption. But, in this case, the New Jersey legislature did not enact any such classification, and the New Jersey Supreme Court could not find any basis

for such a distinction in view of the compelling statement of benefits to New Jersey which that court requested and received from appellant.

There can be no argument that the situation in this case differs from the pattern of cases such as *Wheeling Steel.* Here, as there, it may be suggested that the State of New Jersey was under no duty to admit appellant. It may be further suggested that when appellant submitted its articles and other documents required for qualification as a nonprofit corporation in New Jersey, the officers of that State might have found, under appropriate statutory or administrative criteria, some theoretical difference in the organization of appellant to justify its exclusion as a corporation in that category. But this Court has clearly and repeatedly held that, once appellant *was* admitted as a corporation in any given class, it was entitled to be taxed in the same manner as New Jersey corporations within the same class. Moreover, in view of the undisputed benefits conferred by appellant on the people of New Jersey, no rational basis for the present classification can be found or even suggested.

It is submitted that the decision by the Supreme Court of New Jersey should not be permitted to stand in the face of the well-settled principles set out in the *Wheeling Steel* line of cases.

CONCLUSION.

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX 1.

OPINION OF SUPREME COURT OF NEW JERSEY

A-94 September Term 1966

Reported at 50 N. J. 6, 231 A. 2d 608 (1967)

WHYY, INC.,

Petitioner-Appellant,

v.

BOROUGH OF GLASSBORO,

Respondent-Respondent,

and

DIVISION OF TAX APPEALS OF THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,

Respondent.

Argued May 24, 1967. Decided July 5, 1967.

On appeal from the Superior Court, Appellate Division, whose opinion is reported in 91 *N. J. Super.* 269 (1966).

Mr. Grover C. Richman, Jr. argued the cause for petitioner-appellant (*Mr. Frank J. Ferry* and *Messrs. Richman, Berry & Ferren,* attorneys).

Mr. John W. Trimble argued the cause for respondent-respondent.

Mr. Elias Abelson, Deputy Attorney General, filed a statement in lieu of a brief for respondent Division of

Tax Appeals (*Mr. Arthur J. Sills,* Attorney General of New Jersey, attorney).

The opinion of the Court was delivered by

SCHETTINO, *J.*

This is an appeal involving property tax assessments for the year 1964.

WHYY, INC., a nonprofit Pennsylvania corporation authorized to do business in New Jersey, provides recreational and educational radio and television broadcasts in the Delaware Valley area. Its registered office in New Jersey is at 709 Market Street, Camden. The corporation's license precludes all commercial advertising. Consequently, WHYY is dependent upon contributions for its financing. Among its donors are the Board of Education of Philadelphia, the City of Philadelphia, the Tri-State Instruction Council, and others.

The facilities of the corporation in New Jersey, located in the Borough of Glassboro, consist of 50 acres of land, on which are erected a transmittal station and a tower.

WHYY did not apply for a tax exemption pursuant to the procedures set forth in *N. J. S. A.* 54:4-4.4.[1] The radio station did, however, request the Glassboro Council on November 12, 1963 for an exemption from taxes as an educational nonprofit corporation. Prior to this request, by letter dated November 7, 1963 to the Glassboro Council, WHYY forwarded a copy of the corporation's Annual Report and the corporation's charter to demonstrate its nonprofit and educational character.

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1. "Every municipal tax assessor shall, on or before October 1, 1951, obtain from each owner of real property in his taxing district, for which a tax exemption is claimed, an initial statement under oath in such form as shall be prescribed by the Director, Division of Taxation, showing the right to the exemption claimed. Thereafter, and on or before November 1 of each year, said assessor shall obtain an initial statement, if one has not theretofore been filed."

The claim for exemption was denied. WHYY petitioned the Gloucester County Board of Taxation, claiming an exempt status. Again, the claim was denied. WHYY then petitioned the State Division of Tax Appeals, and the claim was there denied. An appeal was taken to the Appellate Division, which affirmed, 91 *N. J. Super.* 269 (1966), holding that WHYY's property, although owned by a nonprofit corporation, was not exempt from New Jersey tax inasmuch as WHYY was not incorporated or organized under the laws of New Jersey as is required by *N. J. S. A.* 54:4-3.6.[2] WHYY thereafter appealed to this Court.

The fundamental approach of our statutes is that ordinarily all property shall bear its just and equal share of the pubic burden of taxation. As the existence of government is a necessity, taxes are demanded and received in order for government to function. Statutes granting exemption from taxation represent a departure and consequently they are most strongly construed against those claiming exemption. The burden of proving a tax-exempt status is upon the claimant. *Bloomfield v. Academy of Med. of N. J.*, 47 *N. J.* 358, 363 (1966); *Pingry Corp. v. Hillside Tp.*, 46 *N. J.* 457, 461 (1966); *Princeton Univ. Press v. Princeton*, 35 *N. J.* 209, 214 (1961).

WHYY argues (1) that if *N. J. S. A.* 54:4-3.6 discriminates against foreign corporations in granting exemptions,

---

2. *N. J. S. A.* 54:4-3.6 encompasses the exemption from taxation of property of certain nonprofit organizations. It reads in pertinent part as follows:

> "The foregoing exemption shall apply only where the association, corporation or institution claiming the exemption owns the property in question and is incorporated or organized under the laws of this State and authorized to carry out the purpose on account of which the exemption is claimed."

Chapter 24 of the Laws of 1967, effective April 18, 1967, supplements *N. J. S. A.* 54:4-3.6 and bears directly on tax exemptions granted to foreign and domestic nonprofit television stations. This new act is "applicable only to taxes payable in 1968 and thereafter." As the litigation here concerns taxes payable for the year 1964, this supplementary act does not apply.

it is unconstitutional and is a violation of the equal protection clause of the Fourteenth Amendment; (2) that because it has qualified to transact business in New Jersey by registering with the Secretary of State, it is in effect organized under the laws of New Jersey within the meaning of *N. J. S. A.* 54:4-3.6 and, thus, is entitled to exemption; and (3) that it would be useless for it to go through the meaningless act of incorporating in this State.

The Borough moved to dismiss the appeal before us, urging that the constitutional issue was not raised prior to the appeal to us and, as the decision by the Appellate Division was unanimous, WHYY has no right to appeal. *R. R.* 1:7-1(c). Secondly, the Borough argues that because WHYY is a foreign corporation which did not organize under the laws of New Jersey within the meaning of *N. J. S. A.* 54:4-3.6, it is not entitled to an exemption. Finally, the Borough argues that the failure by WHYY to comply with *N. J. S. A.* 54:4-4.4 precludes the station from claiming a tax exemption.

I.

This Court may but need not accept a constitutional question not raised below. *Lattieri v. State Board of Medical Examiners,* 24 N. J. 199, 206 (1957). As this constitutional contention is one of great concern to many municipalities and nonprofit foreign corporations, the public interest in this question demands that it be decided. *Cf. Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick,* 48 *N. J.* 94, 109 (1966); *State v. Perricone,* 37 *N. J.* 463, 469, *certiorari* denied 371 *U. S.* 890, 83 *S. Ct.* 189, 9 *L. Ed.* 2*d* 124 (1962).

The Legislature is given wide latitude in classifying for the purposes of taxation. That another classification might be superior or equal to the Legislature's classification is not enough to show that a statute is unconstitutional. As long as the statute may be justified on any reasonable theory, the Legislature's determination will be upheld.

General Electric Co. v. Passaic, 28 *N. J.* 499, 506-10 (1958), appeal dismissed 359 *U. S.* 1006, 79 *S. Ct.* 1146, 3 *L. Ed.* 2*d* 987 (1959).

Moreover, there is a strong presumption that a statute is constitutional, *In re Loch Arbour,* 25 *N. J.* 258, 264-65 (1957), and a legislative act will not be declared void unless its repugnancy to the Constitution is clear beyond a reasonable doubt. *Gangemi v. Berry,* 25 *N. J.* 1, 10 (1957). "To declare a statute unconstitutional is a judicial power to be delicately exercised." *Wilentz v. Hendrickson,* 133 *N. J. Eq.* 447, 487 (*Ch.* 1943, affirmed 135 *N. J. Eq.* 244 (*E. & A.* 1944). It is true that a classification may not be arbitrary, but the burden of proof is on him who asserts an unjust and illegal discrimination. *Wiramal v. Director of Div. of Taxation,* 36 *N. J.* 201, 210 (1961); *Harvey v. Essex County Board of Freeholders,* 30 *N. J.* 381, 388-91, (1959).

As noted above, the Legislature is given considerable latitude in determining classes for purposes of taxation. The Legislature is presumed to have a valid classification in mind. Distinctions will be presumed to rest upon a rational basis if there be any conceivable state of facts which would afford reasonable support for them. *Harvey v. Essex County Board of Freeholders, supra,* 30 *N. J.* at 388-91.

Here, there are possibilities for treating foreign nonprofit corporations differently from domestic nonprofit corporations.

It should be noted that our statute requires not only that the property be used for a specified purpose but also that the owner shall be a nonprofit organization. The corporation laws of sister states may be less exacting than New Jersey with respect to what organizations qualify as nonprofit. If New Jersey were to grant tax exemptions to foreign nonprofit corporations because the state of incorporation deemed them to be nonprofit in nature, it may

well be that exemptions would thereby be granted to corporations which, if formed here, would not have a tax exempt status. The Legislature could validly decide that the State should not be burdened with the administrative problem of checking the status of foreign corporations under foreign laws and evaluating them with our requirements.

We hold that the statute is not unconstitutional.

II.

WHYY seeks to avoid the requirement of *N. J. S. A.* 54:4-3.6, that to be entitled to an exemption a nonprofit corporation must be "incorporated or organized under the laws of this State." WHYY argues that although it is not incorporated under the laws of New Jersey, it is "organized" under our laws because it qualified to transact business here by registering with the Secretary of State. It, therefore, should be entitled to an exemption.

We agree with the Appellate Division interpretation of *N. J. S. A.* 54:4-3.6. The word "incorporated" refers back to nonprofit associations, whereas the word "organized" refers back to nonprofit associations and institutions which may not be "incorporated." Certainly, the word "organized" does not refer to foreign corporations which qualify and register but which are not incorporated in this State. See Appellate Division's opinion, 91 *N. J. Super.* 272.

III.

As WHYY is not entitled to a tax exemption under *N. J. S. A.* 54:4-3.6, it is not necessary for us to determine whether the failure by WHYY to comply with *N. J. S. A.* 54:4-4.4 (notifying the tax assessor before November 1 of a claim to an exemption) should preclude the station from asserting an exempt status.

Affirmed; no costs.

APPENDIX 2.

OPINION OF SUPERIOR COURT OF NEW JERSEY.

Reported at 91 N. J. Super. 269, 219 A. 2d 893 (1966)

Submitted May 16, 1966—Decided May 20, 1966

Before: Judges GOLDMANN, FOLEY and COLLESTER.

MR. FRANK J. FERRY, Attorney for Appellant.

MR. JOHN W. TRIMBLE, Attorney for Respondent, Borough of Glassboro.

MR. ELIAS ABELSON, Deputy Attorney General, filed a statement in lieu of brief for respondent Division of Tax Appeals (MR. ARTHUR J. SILLS, Attorney General, Attorney).

PER CURIAM

WHYY, Inc. appeals from judgments of the Division of Tax Appeals affirming the action of the Gloucester County Tax Board in denying its application for tax exemption of property owned by it in Glassboro. WHYY is a Pennsylvania corporation whose principal office is located in Philadelphia. It was formed as a nonprofit corporation to provide cultural, recreational and educational radio and television broadcasts in the Delaware Valley area, and to establish, construct and otherwise acquire or operate noncommercial, educational radio and television broadcast stations and facilities in Pennsylvania, New Jersey and Delaware. The company is registered in this State as a foreign nonprofit corporation, authorized to do business in New Jersey.

The Federal Communications Commission has licensed WHYY to operate and telecast over Channel 12 as a noncommercial, educational station. It has studios in Philadelphia, Pa. and Wilmington, Del. The facilities in New Jersey consist of 50 acres located in Glassboro, on which are erected a transmittal building and a 1,000-foot guy tower, the heart of its broadcasting system. WHYY is precluded from all commercial advertising. It depends on contributions from school systems and individuals to finance its operations.

The corporation appealed to the Gloucester County Tax Board from assessments levied against its property in Glassboro, claiming tax exemption as a nonprofit and educational institution. The board upheld the assessments. The Division of Tax Appeals affirmed that action upon appeal.

WHYY asserts that as a registered nonprofit foreign corporation it is authorized to own real property in New Jersey, R. S. 14:15-1; that under R. S. 14:15-2 a foreign corporation doing business here is subject to all the benefits as well as burdens of our laws, and for these reasons it is entitled to any exemption a New Jersey corporation might claim. It therefore contends that it should have been granted a tax exemption as an educational and charitable nonprofit corporation by virtue of the provisions of N. J. S. A. 54:4-3.6.

The flaw in this reasoning becomes apparent upon a reading of the statute. After listing the various categories of property entitled to tax exemption, N. J. S. A. 54:4-3.6 concludes with the following language:

> "The following exemptions shall apply only where the association, corporation or institution claiming the exemption owns the property in question *and is incorporated or organized under the laws of this State* and authorized to carry out the purposes on account of which the exemption is claimed." (Italics ours.)

The statutory language is entirely clear, WHYY meets two of its requirements: it owns the property in question and is authorized to carry out the purposes on account of which the exemption is claimed. However, the company is not "incorporated or organized under the laws of this State." Were it not for this, it would meet the criteria of N. J. S. A. 54:4-3.6.

Statutes granting exemption from taxation are construed most strongly against the claimant, who bears the burden of proving a tax-exempt status. *Princeton University Press v. Princeton,* 35 N. J. 209, 214 (1961), and cases there cited. WHYY would avoid the very specific requirement of the quoted statute by arguing that although it is not "incorporated" under the laws of New Jersey, it is "organized" under our laws; that being fully qualified to transact business here under R. S. 14:15-2 and subject to all our laws, it should therefore be entitled to tax exemption. The words "incorporated or organized" in the closing sentence of N. J. S. A. 54:4-3.6 refer back to the beginning of that sentence and relate to "association, corporation or institution." The word "organized" refers to associations or institutions that may not be "incorporated"—it certainly does not refer to foreign corporations which are incorporated or organized in another state.

Appellant claims that a strict interpretation of the statute so as to require bona fide, foreign nonprofit corporations to incorporate in New Jersey is unreasonable and has no relation to the expressed objective of the legislation, which is to foster and encourage educational, charitable and cultural endeavors. However, as stated, statutes of exemption from taxation must be strictly construed. If the subjects of exemption are to be enlarged, it is for the Legislature to bestow that privilege, and not the courts.

Affirmed.

APPENDIX 3.

TEXT OF STATUTES.

NEW JERSEY STATUTES ANNOTATED.

TITLE 14, CHAPTER 15-2.

14:15-2. Foreign Corporations Subject to Title.

A foreign corporation doing business in this state shall be subject to the provisions of this title, so far as the same can be applied to foreign corporations.

14:15-3. Copy of Charter and Statement to Be Filed; Certificate of Authority to Do Business.

Every foreign corporation, except banking, insurance, ferry and railroad corporations, transacting any business in this state, shall file in the office of the secretary of state a copy of its charter or certificate of incorporation, attested by its president and secretary, under its corporate seal, and a statement attested in like manner setting forth:

a. The amount of its authorized capital stock and the amount actually issued;

b. The character of the business which it is to transact in this state; and

c. The principal office of the corporation in this state and the name and place of abode of an agent upon whom process against such corporation may be served, which agent shall be a domestic corporation or a natural person of full age actually resident in this state, and the agency shall continue until the substitution, by writing, of another agent.

Thereupon the secretary of state shall issue to the corporation a certificate that it is authorized to transact business in this state, and that the business is such as may be lawfully transacted by corporations of this state, and he shall keep a record of all such certificates issued.

14:15-4. Certificate of Authority to Do Business Prerequisite to Suits on Contracts.

Until such corporation so transacting business in this state shall have obtained such certificate of the secretary of state, it shall not maintain any action in this state upon any contract made by it in this state.

NEW JERSEY STATUTES—TITLE 54, CHAPTER 4-3.6. EXEMPTIONS FROM TAXATION.

54:4-3.6. Exemption of Property of Nonprofit Organizations

The following property shall be exempt from taxation under this chapter: All buildings actually used for colleges, schools, academies or seminaries; all buildings actually used for historical societies, associations or exhibitions, when owned by the State, county or any political subdivision thereof; all buildings actually and exclusively used for public libraries, religious worship or asylum or schools for feeble-minded or idiotic persons and children; all buildings used exclusively by any association or corporation formed for the purpose and actually engaged in the work of preventing cruelty to animals; all buildings actually and exclusively used and owned by volunteer first-aid squads, which squads are or shall be incorporated as associations not for pecuniary profit; all buildings actually and exclusively used in the work of associations and corporations organized exclusively for the moral and mental im-

provement of men, women and children, or for religious, charitable or hospital purposes, or for one or more such purposes; all buildings owned or held by an association or corporation created for the purpose of holding the title to such buildings as are actually and exclusively used in the work of 2 or more associations or corporations organized exclusively for the moral and mental improvement of men, women and children; all buildings owned by a corporation created under or otherwise subject to the provisions of Title 15 of the Revised Statutes and actually and exclusively used in the work of one or more associations or corporations organized exclusively for charitable or religious purposes, which associations or corporations may or may not pay rent for the use of the premises or the portions of the premises used by them; the building actually occupied as a parsonage by the officiating clergymen of any religious corporation of this State, to an amount not exceeding $5,000.00; the land whereon any of the buildings hereinbefore mentioned are erected, and which may be necessary for the fair enjoyment thereof, and which is devoted to the purposes above mentioned and to no other purpose and does not exceed 5 acres in extent; the furniture and personal property in said buildings if used in and devoted to the purposes above mentioned; all property owned and used by any non-profit corporation in connection with its curriculum, work, care, treatment and study of feeble-minded, mentally retarded, or idiotic men, women, or children shall also be exempt from taxation, provided that such corporation conducts and maintains research or professional training facilities for the care and training of feeble-minded, mentally retarded, or idiotic men, women, or children; provided, in case of all the foregoing, the buildings, or the lands on which they stand, or the associations, corporations or institutions using and occupying them as aforesaid, are not conducted for profit, except

that the exemption of the buildings and lands used for charitable, benevolent or religious purposes shall extend to cases where the charitable, benevolent or religious work therein carried on is supported partly by fees and charges received from or on behalf of beneficiaries using or occupying the buildings; provided, the building is wholly controlled by and the entire income therefrom is used for said charitable, benevolent or religious purposes. The foregoing exemptions shall apply only where the association, corporation or institution claiming the exemption owns the property in question and is incorporated or organized under the laws of this State and authorized to carry out the purposes on account of which the exemption is claimed. As amended L. 1941, c. 243, p. 663, § 1; L. 1949, c. 85, p. 394, § 1; L. 1960, c. 119, p. —, § 1.

APPENDIX 4.

UNITED STATES CONSTITUTION.

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX 5.

PENNSYLVANIA NONPROFIT CORPORATION LAW.
Title 15 Sections 7001, 7003.

§ 7001.

This act shall be known, and may be cited, as the "Nonprofit Corporation Law."

§ 7003.

A. Except as provided in section 4 of this act, the provisions of this act shall apply to:

(1) Every domestic corporation not for profit incorporated under any general or special act since October 13, 1857; and

(2) Every domestic corporation not for profit incorporated under any general or special act prior to October 14, 1857, which (i) by the terms of its charter or the act under which it was incorporated, holds a charter subject to alteration or revocation, or (ii) accepts or has since October 13, 1857, accepted the Constitution of Pennsylvania in any manner whatsoever.

B. (1) Except as provided in section 4 of this act, every domestic corporation not for profit which is not brought within the scope of this act by subsection A of this section, shall after January 1, 1967, be conclusively deemed to exist under and shall be governed by the provisions of this act, unless on or before January 1, 1967, such corporation shall have filed with the Department of State a certificate declining to accept the provisions of the Constitution of Pennsylvania and of this act. The certificate shall be executed under the seal of the corporation, shall be signed by two duly authorized officers of the corporation, and shall set forth:

(i) The name and address of the corporation,

(ii) The act of Assembly by or under which it was incorporated,

(iii) A statement that the corporation declines to accept the Constitution of Pennsylvania and the provisions of this act, and

(iv) A statement that the nonacceptance of the Constitution of Pennsylvania and of the provisions of this act was duly authorized at a special meeting of the members called for that purpose or at an annual meeting of the members.

No fee shall be charged for the filing of such a certificate.

(2) The names of all corporations filing such certificates shall be listed on a register maintained for that purpose by the Department of State. Such register shall be combined with any similar register established by any other act. Whenever any corporation named on such register shall file any other document under this act or do any other act amounting to acceptance of the Constitution of Pennsylvania, the department shall remove such corporation's name from the register. The acceptance for filing of such a certificate shall not preclude the Commonwealth or any interested person from directly or collaterally establishing, in any proceeding to which the corporation is a party, that such acceptance for filing was improper.

(3) Whenever the Department of State shall reject a certificate tendered for filing under this subsection B on the ground that the corporation named therein has theretofore accepted the Constitution of Pennsylvania, or shall remove a corporation's name from such register, on the

ground either that such corporation was improperly included thereon or that it has accepted the Constitution of Pennsylvania, it shall notify the corporation thereof by certified mail and such notice shall be accompanied by a brief statement by the department of its finding as to the manner in which acceptance of the Constitution was effected.

(4) The filing of a certificate of nonacceptance under this subsection shall be deemed to be in compliance with the police power of the Commonwealth and shall not of itself constitute acceptance of the Constitution of Pennsylvania.

C. Except as provided in section 4 of this act, every foreign corporation not for profit shall be subject to the provisions of this act. If a foreign corporation not for profit is on January 1, 1966, admitted to do business in this Commonwealth by the filing of a power of attorney and statement under the act of June 8, 1911 (P. L. 710), such power of attorney and statement shall be deemed an approved application for a certificate of authority issued under this act, and such corporation shall be deemed a holder of such a certificate. Such corporation shall include in its initial application, if any, for an amended certificate of authority under this act the information required by this act to be set forth in an application for a certificate of authority.

D. Except as provided in this section, this act shall not be construed as attempting to deprive any existing corporation of any corporate power, right, privilege or franchise which such corporation now enjoys. A corporation not for profit shall not hereafter operate in any manner resulting in pecuniary profit or gain to its members.